No. 21,165

IN THE

United States Court of Appeals

For the Ninth Circuit

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, SECURITY SAVINGS AND LOAN ASSOCIATION and VICTORIA SAVINGS AND LOAN ASSOCIATION,

Appellants,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, etc., et al.,

Appellees.

OPENING BRIEF OF APPELLANT AMERICAN TELEPHONE AND TELEGRAPH COMPANY

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PRELIMINARY STATEMENT

This case involves the rights of depositors to participate in the distribution of the assets of an insolvent national bank. It raises two questions: (1) whether a depositor is entitled to the return of a deposit which was obtained by fraud; and (2) whether depositors who participated with the bank in wrongful acts should be subordinated to innocent depositors in the distribution of the bank's assets.

STATEMENT OF JURISDICTION

Appellant American Telephone and Telegraph Company, a depositor in the insolvent San Francisco National Bank, brought an action in the United States District Court for the Northern District of California (1) to prevent the Bank's receiver (Federal Deposit Insurance Corporation) from distributing the Bank's assets to depositors who participated with the Bank in wrongful acts, until innocent depositors, including appellant, had been paid in full; and (2) to recover its deposit either by rescission or by the imposition of a constructive trust on the assets of the Bank in favor of appellant (R. 2-12). The district court (Honorable William C. Mathes, Senior United States District Judge) dismissed the action as to all defendants except the receiver on the ground that no Federal question had been stated as to them,[1] and later dismissed the entire action (R. 155-156).

The district court had jurisdiction of the action, with respect to defendant Federal Deposit Insurance Corporation (hereinafter referred to as "FDIC"), under section 1819 of Title 12 of the United States Code (64 Stat. 873, 881) which provides that

> "All suits of a civil nature at common law or in equity to which the [Federal Deposit Insurance] Corporation shall be a party shall be deemed to arise under the laws of the United States."

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[1]The dismissal of defendants other than the receiver was embodied in two orders; the first, on the court's own motion and without notice or hearing (R. 93-94), and the second, denying a motion by appellant to vacate the first order (R. 157-158).

The district court acknowledged its jurisdiction over FDIC but not over the other defendants. It is the position of appellant that the district court had jurisdiction over those defendants pursuant to section 1331 of Title 28 of the United States Code because "the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the * * * laws * * * of the United States." The jurisdiction of the district court over those defendants is more fully discussed at pages 13-16 of this brief.

This Court has jurisdiction of this appeal pursuant to section 1291 of Title 28 of the United States Code.

THE FACTS

Since the action was dismissed on the pleadings, the matters alleged in the complaint must be taken as true (*Williford v. People of California* (9 Cir. 1965) 352 F.2d 474, 475).

On December 28, 1964, appellant renewed a deposit of $500,000 with San Francisco National Bank and received a certificate of deposit for that sum payable, with interest, on a date certain (R. 5; see also R. 78). Eighteen banking days later, on January 22, 1965, the Bank was closed by the Comptroller of the Currency, and FDIC was appointed its receiver (R. 6; see also R. 79).

The sole compensation that appellant received for its deposit was the promise of the Bank to pay interest at a legal rate. Other holders of certificates of deposit (who are defendants in this action) directly or indirectly re-

ceived, in addition to interest at the legal rate, illegal bonuses or bounties for their deposits (R. 4-5).

FDIC in its answer "admit[s] that some of the other defendants * * * received bounties directly or indirectly from the bank as alleged" (R. 78). A report of the United States Senate Committee on Governmental Operations, of which the court below had notice, states that "abuses associated with certificates of deposit are principal factors in the chain of events that led to recent bank failures," and gives as an example "San Francisco National Bank, which paid 7 percent for certain large amounts of funds obtained by certificates of deposit" (Interim Report of Committee on Governmental Operations (U.S. Senate, 89th Cong., 2d Sess.), p. 6, see also pp. 8 and 31).[2]

Also, when appellant renewed its deposit, the Bank's officials concealed from appellant (1) the fact that the Bank was paying bounties and engaging in other illegal activities, and (2) the fact that the Bank was then insolvent or in imminent danger of becoming insolvent (R. 5-6). Had appellant known the true financial condition of the Bank, or of the payment of bounties, or of the other illegal activities, it would not have renewed its deposit (R. 6).

Appellant rescinded its deposit and demanded the return of its $500,000 (R. 7; see also R. 80). Except to the extent that FDIC paid appellant $10,000 insurance pro-

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[2]The FDIC, relying on that report, informed the court that this conduct "contributed to the failure of San Francisco National Bank" (Closing Brief of FDIC in support of motion to dismiss in *A.M.R., Inc., et al. v. Federal Reserve Bank of San Francisco, et al.* (Civil Action No. 44387, p. 4; quoted R. 142).

ceeds for that portion of the deposit protected by Federal Deposit Insurance, FDIC refused to return appellant's deposit (R. 7; see also R. 80-81). It took the position that appellant may only share in the assets of the Bank on the same basis as all general creditors (R. 81), including those depositors which FDIC admits received bounties from the Bank (R. 78).

Appellant thereupon brought this action in the district court for the return of its deposit and, in addition, to compel subordination of the claims of the bounty takers to the claims of appellant and the other innocent depositors (R. 1-12). On its own motion and without notice or hearing (R. 93), the court below dismissed the action as to all defendants other than FDIC on the ground that

> "* * * it appears that any claim or cause of action which plaintiff has against the defendants other than Federal Deposit Insurance Corporation is non-federal in character, arises under State law, and may properly be prosecuted in the State courts" (R. 92).

Appellant moved to vacate this order (R. 95-110), but the court denied the motion (R. 157-158).[3] The order also provided that

> "* * * it appearing to the Court that, in addition to the reasons set forth in the Order Dismissing Action as to Certain Defendants and as to Certain Claims, said order was entered without prejudice to the right of the dismissed defendants and cross-defendants, if so advised, to seek intervention pursuant to Fed.R.

[3]The motion to vacate was also denied without a hearing. It had been set for hearing on April 28, 1966 (R. 95). However, before that date the district court issued an order that this and other motions be deemed submitted on the date set without hearing (R. 487).

> Civ.P. 24 in Civil Action No. 43512, *In the Matter of the Liquidation of the San Francisco National Bank,* now pending in this Court; * * *'' (R. 157).

Meanwhile, FDIC had moved to dismiss the action (R. 126-129). The motion was granted by Judge Mathes,[4] with similar ''leave to plaintiff * * * to present * * * [its] claims by seeking intervention pursuant to Fed.R.Civ.P. 24, in Civil Action No. 43512, *In the Matter of the Liquidation of the San Francisco National Bank,* now pending in this Court'' (R. 155-156).

Appellant filed timely notice of appeal (R. 457). Appellant, observing Judge Mathes' suggestion, also filed a petition to intervene in the liquidation proceeding, then pending before Judge Wollenberg (*In the Matter of the Liquidation of the San Francisco National Bank,* U.S.D.C. No. 43512). Judge Wollenberg denied appellant's petition (R. 151-152 in No. 21258 now pending in this Court), and appellant filed timely notice of appeal from that denial (ibid., at 153).

The cross claimants

Two of the defendants named as bounty takers (Victoria Savings & Loan Assn. and Security Savings & Loan Assn.) denied receiving bounties, and made cross demands against appellant and all other defendants, alleging substantially the same facts as appellant and demanding substantially the same relief (R. 210-234, 196-204). Their cross demands were dismissed on the same grounds and at the same time as appellant's claim (R. 93-94; 155-158),

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[4]This motion was likewise granted without a hearing. It had been noticed for May 24 (R. 128), but by order of the court was taken under submission without hearing (R. 487).

and they likewise have appealed (R. 159-160, 423-424). Two other defendants (State Savings & Loan Assn. of Stockton and Benj. Franklin Federal Savings & Loan Assn.) did not cross complain but, in their answers, denied taking bounties and prayed for the same affirmative relief as was demanded by appellant (R. 178-188; 325-336).

SPECIFICATION OF ERRORS

The Court below erred

(1) in dismissing appellants' action in so far as appellant seeks a return of its deposit in San Francisco National Bank either by rescission or through the imposition of a constructive trust;

(2) in dismissing the defendants other than FDIC from the action;

(3) in dismissing the action in so far as appellant seeks to establish that depositors who received bounties should not be permitted to share equally with appellant and other depositors who did not participate in any wrongdoing.

ARGUMENT

I. THE COMPLAINT STATES FACTS WHICH ENTITLE APPELLANT TO RESCISSION AND TO A CONSTRUCTIVE TRUST.

Where a deposit is accepted by a national bank under the circumstances described above, courts of equity will allow a rescission or impose a constructive trust on a deposit which augments the assets of the bank and which can be traced into the hands of the receiver.

A. The Bank's fraudulent acceptance of appellant's renewal of deposit is grounds for rescission or imposing a constructive trust.

A bank commits a fraud upon a depositor when it accepts his deposit while insolvent, to the knowledge of its officers.

> "* * * [O]fficers who receive deposits in an insolvent bank are guilty of a fraud, if not a crime * * *. [A]ll the authorities agree that the receipt of a deposit by an insolvent bank is a fraud on the depositor, that title to the deposit does not pass, and that the deposit may be followed so long as it can be identified" (*Federal Reserve Bank v. Idaho Grimm Alfalfa Seed G. Ass'n* (9 Cir. 1925) 8 F.2d 922, 928, certiorari denied (1926) 270 U.S. 646).

Under such circumstances, the depositor is entitled to recover his deposit either by rescission or the imposition of a constructive trust (*St. Louis &c. Railway Co. v. Johnston* (1890) 133 U.S. 566, 576-577; *Carnegie-Illinois Steel Corporation v. Berger* (3 Cir. 1939) 105 F.2d 485, 487, certiorari denied (1939) 308 U.S. 603).

In addition a depositor is entitled to a constructive trust when his deposit is received under circumstances other than insolvency if it was wrong or contrary to law or good conscience for the bank to accept the deposit as a general deposit (*Tucker v. Newcomb* (4 Cir. 1933) 67 F.2d 177, 179).

San Francisco National Bank was known by its officers to be insolvent or in imminent danger of becoming insolvent when appellant renewed its deposit of $500,000 (R. 6). The Bank concealed that fact from appellant (R. 6). It also concealed the fact that it was paying illegal boun-

ties to other depositors, and that its officers were engaged in other illegal activities which imperiled its financial stability (R. 6). The Bank's acceptance of the renewal of appellant's deposit under such circumstances perpetrated a fraud upon appellant (R. 8).

Section 50 of the National Bank Act (Act of June 3, 1864, 13 Stat. 99, 114-115; 12 U.S.C. 194),[5] which provides for ratable distribution of the assets of an insolvent national bank, permits rescission or the imposition of a constructive trust. The depositor is entitled to recover because he has a right to the money deposited, and to the extent he has such right the receiver has none (ibid., see also *Moran v. Judson* (D.C.Cir. 1938) 96 F.2d 551, 554). As the United States Supreme Court has said:

> "The requirement as to ratable dividends, is to make them from what belongs to the bank, and that which at the time of insolvency belongs of right to the debtor does not belong to the bank" (*Scott v. Armstrong* (1892) 146 U.S. 499, 510).

B. The renewal of appellant's deposit augmented the assets of the Bank.

A deposit augments the assets of a bank when the bank obtains the right to use funds to which it otherwise would not be entitled. Transactions analogous to the renewal of a certificate of deposit have been held to be an augmenta-

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[5]This statute provides, in relevant part:

> "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; * * *."

tion of assets. In *Federal Reserve Bank v. Idaho Grimm Alfalfa Seed G. Ass'n* (9 Cir. 1925) 8 F.2d 922, 928, certiorari denied (1926) 270 U.S. 646, this Court held that a deposit of checks drawn on another bank augments the assets of the depository bank, despite the fact that the depository bank used the credits for the checks to offset its debts in clearing transactions. Similarly, in *Am. Nat'l Bank v. Miller* (1913) 229 U.S. 517, the Supreme Court held that there was a deposit when a bank, being presented with a check drawn upon it, merely debited the account of the drawer and credited the account of the payee:

> "In the present case it was as though an officer of the Macon Bank [Payee] had presented the check to the Teller of the Nashville Bank [drawee and collecting agent of the Macon Bank] and on receiving the money had paid it back over the counter for deposit to the credit of the Macon Bank" (*Am. Nat'l. Bank v. Miller* (1913) 229 U.S. 517, 520).[6]

Similarly, appellant, by its renewal, merely short cut the formality of a withdrawal and redeposit.

For purposes of finding augmentation, the situation in the instant case must be carefully distinguished from that which would have obtained had there been no fraud by the Bank.

> *Jennings v. U.S.F. & G. Co.* (1935) 294 U.S. 216, 222-223;
>
> *Adams v. Champion* (1935) 294 U.S. 231, 236-238;

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[6]Cases can be found which reflect a mechanistic approach to augmentation. See, e.g., *Walsh v. Deitrick* (D.Mass. 1938) 22 F. Supp. 377. However, a just and equitable application of the augmentation rules requires rejection of this approach.

Old Company's Lehigh v. Meeker (1935) 294 U.S. 227, 229;

Hoffman v. Rauch (1937) 300 U.S. 255, 257.

As the Court pointed out in the *Jennings* case, the courts are more inclined to find an augmentation in cases of constructive trusts or trusts ex maleficio (*Jennings v. U.S.F. & G. Co.* (1935) 294 U.S. 222-223).[7]

C. Appellant's deposit may be traced into the assets of the Bank.

The December 28, 1964 deposit may be traced into the assets of the Bank. Since the Bank committed a fraud on appellant, it had no right to commingle the deposit with its other funds, and is presumed to have set apart the $500,000 and maintained that sum as the property of appellant.

National Bank v. Insurance Co. (1881) 104 U.S. 54, 69-70;

Merchants' Nat. Bank v. School Dist. No. 8 (9 Cir. 1899) 94 Fed. 705, 707;

Scully v. Pacific States Savings & Loan Co. (9 Cir. 1937) 88 F.2d 384, 386-387, certiorari denied sub. nom. *Ellingson v. Pacific States Savings & Loan Co.* (1937) 301 U.S. 704.[8]

If FDIC claims that the $500,000 was dissipated during the few days prior to the closing of the Bank, it has the burden of establishing that fact (*American Surety Co. v.*

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[7]See also *Blakey v. Brinson* (1932) 286 U.S. 254, 262-263, where the Court discussed augmentation with reference to an asserted *intentional* trust.

[8]See also *Bank of America Assn. v. California Bk.* (1933) 218 Cal. 261, 276, 22 P.2d 704, 710.

Jackson (9 Cir. 1928) 24 F.2d 768, 770; *Scully v. Pacific States Savings and Loan Co.* (9 Cir. 1937) 88 F.2d 384, 387). This it cannot do on the basis of a mere motion to dismiss.

Thus the facts alleged in the complaint give rise to a right of rescission and a constructive trust in favor of appellant and other depositors who may be similarly situated. The depositors who received illegal consideration for their deposits, on the other hand, are not entitled to such relief. The payment of such consideration "contributed to the insolvency of [the] Bank" (R. 9), and the doctrine of unclean hands prevents the recipients from obtaining equitable relief.

II. THE CLAIMS OF DEPOSITORS THAT RECEIVED ILLEGAL BOUNTIES SHOULD BE SUBORDINATED TO THE CLAIMS OF INNOCENT DEPOSITORS.

The bounties received by depositors named as defendants in the complaint were prohibited by law. Under section 19 of the Federal Reserve Act (Act of December 22, 1913, 38 Stat. 256, 270, as amended; 12 U.S.C. 371b)[9], the Board of Governors of the Federal Reserve System has specified the maximum consideration which may be paid by member banks on time and savings deposits. That consideration is found in Regulation Q of the Federal Reserve System (12 C.F.R. 217.0-217.6), as supplemented

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[9]At all pertinent times this statute provided:

"The Board of Governors of the Federal Reserve System shall from time to time limit by regulation the rate of interest which may be paid by member banks on time and savings deposits * * *" (49 Stat. 714, 715).

from time to time by publications in the Federal Register. The complaint alleges that the defendant depositors received consideration in excess of the legal rates (R. 4-5).

A. The district court erred in dismissing the depositors who received illegal bounties.

Appellant claims that the depositors it named as defendants joined in violations of Regulation Q (R. 4-5), and therefore should not be permitted to share equally with other depositors in the liquidation of the Bank's assets (R. 11). These defendants should be parties to the determination of whether in fact they received illegal bounties and whether such receipt is grounds for subordinating their claims to the claims of the innocent depositors. Rule 19 of the Federal Rules of Civil Procedure, as amended effective July 1, 1966, provides:

> "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if * * * he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."[10]

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[10]At the time the action was filed, the amendments to Rule 19 containing the foregoing provisions had not become effective. The amendments, however, restate the same principle which was recognized by this Court in *State of Washington v. United States* (9 Cir. 1936) 87 F.2d 421, 427-428 (see also 2 Barron & Holtzoff, Federal Practice and Procedure (1966 Pocket Part) p. 25; 3 Moore's Federal Practice (1966 Supplement) p. 150).

If the depositors whose claims appellant seeks to have subordinated are not parties to the action, their ability to protect their interests might be impaired; alternatively, if they are not parties, they might not be bound by a judgment subordinating their claims, and the receiver could be subjected to inconsistent obligations in liquidating the Bank's assets.

The district court nonetheless ignored the principles set forth in Rule 19 and based its dismissal on the ground that there is no Federal-question jurisdiction over those parties:

> "[A]s to all * * * defendants [other than FDIC] there appears no claim or cause of action asserted in the complaint which 'arises under the Constitution, laws or treaties of the United States' * * *."
>
> "(7) from what is alleged in the complaint, it appears that any claim or cause of action which plaintiff has against the defendants other than Federal Deposit Insurance Corporation is non-federal in character, arises under State law, and may be properly prosecuted in the State courts * * *" (R. 90-92).

Appellant's causes of action against those defendants do in fact arise under the laws of the United States and involve substantial Federal questions. They put directly in issue the interrelationship of two Federal statutes, section 19 of the Federal Reserve Act (12 U.S.C. 371b) and section 50 of the National Bank Act (12 U.S.C. 194), and the effect of these statutes upon the claims of those defendants to share ratably with appellant and others similarly situated in the distribution of the assets of an insolvent national bank.

Appellant's complaint also puts directly in issue the principles of equity that should be applied, as a matter of Federal law, in paying "ratable dividends" (12 U.S.C. 194) to achieve a just and proper distribution of assets in a national bank liquidation.

Appellant properly and clearly raised these Federal questions in all counts of its complaint. In paragraph IV of the first count, appellant alleged that the defendants dismissed by the lower court received directly or indirectly from San Francisco National Bank, as compensation for making or renewing their deposits, and in addition to interest at legal rates, "certain benefits, bounties or gratuities prohibited by law" (R. 4-5).

Appellant's third and fourth counts (R. 8-10) incorporate these allegations by reference and allege that the bounty takers should be subordinated to the innocent depositors in the distribution of the assets of San Francisco National Bank because those defendants acted in a manner contrary to public policy, i.e., the policy expressed in section 19 of the Federal Reserve Act (12 U.S.C. 371 b) and Regulation Q (12 C.F.R. 217.0-217.6), and because that policy should be enforced by subordinating the claims of the bounty takers to the claims of the innocent depositors.

The equitable principles that are to be applied in adjudicating the rights of depositors with respect to the distribution of the assets of an insolvent national bank are also matters of Federal law. In *Amer. Surety Co. v. Bethlehem Bank* (1941) 314 U.S. 314, the Court held:

> "The National Bank Act provides for the 'ratable' distribution of assets of insolvent national banks.

R.S. §5236; 12 U.S.C. §194. The question for decision [the rights of a surety to share in the assets of a national bank] is therefore one of federal law. *Deitrick v. Greaney,* 309 U.S. 190, 200-201; *Merrill v. National Bank of Jacksonville,* 173 U.S. 131; *Davis v. Elmira Savings Bank,* 161 U.S. 275; *Cook County Nat. Bank v. United States,* 107 U.S. 445, 448. Congress has seen fit not to anticipate by specific rules solution of problems that inevitably arise in national bank liquidations. Instead, it chose achievement of a 'just and equal distribution' of an insolvent bank's assets through the operation of familiar equitable doctrines evolved by the courts'' (314 U.S. 316-317).

B. Depositors who received illegal bounties should not be permitted to share equally with innocent depositors in the liquidation of the Bank's assets.

Those depositors who took bounties contributed to the failure of San Francisco National Bank. The Supreme Court has recently said that the prohibitions against paying interest on deposits in excess of legal rates were aimed at insuring sound banking practices (*U.S. v. Philadelphia Nat. Bank* (1963) 374 U.S. 321, 329). The only effective way to enforce the Federal policy prohibiting bounties, after a national bank has become insolvent, is to prevent the bounty takers from sharing in the bank's assets until the other depositors have been paid in full. Otherwise, the bounty takers may defy the law with impunity and pass the risk of their conduct to the other depositors, who will be forced to share with them in the remaining assets of the insolvent bank.

In another context, the Supreme Court has said that the National Bank Act may be invoked by the creditor for whose benefit it was enacted ''in preventing the conse-

quences which the Act was designed to prevent'' (*Deitrick v. Greaney* (1940) 309 U.S. 190, 199). The most drastic consequences of violations of Federal banking laws is the closing of a national bank because of the wrongdoing of its officers and those with whom they did business.

Section 50 of the National Bank Act (12 U.S.C. 194), which provides for ''ratable dividends,'' permits consideration of the equities of the various claimants in deciding to whom a ''ratable dividend'' is to be paid. The Supreme Court has recognized that equity does not always require absolute equality among depositors. For example, equality yields to superior equity (*Scott v. Armstrong* (1892) 146 U.S. 499, 511), or to the ''obligation to do justice'' (*Rankin v. Emigh* (1910) 218 U.S. 27, 35). Thus, in providing for ''ratable'' distribution:

> ''Congress has seen fit not to anticipate by specific rules solution of problems that inevitably arise in national bank liquidations. Instead, it chose achievement of a 'just and equal distribution' of an insolvent bank's assets through the operation of familiar equitable doctrines evolved by the courts'' (*Amer. Surety Co. v. Bethlehem Bank* (1941) 314 U.S. 314, 316).

Other Federal courts have also recognized that the receivership of a national bank is in equity and calls for the application of equitable principles in the payment of claims (*General American Life Ins. Co. v. Anderson* (6 Cir. 1946) 156 F.2d 615, 621), and that the National Bank Act is to be given a liberal construction by the courts for the protection of creditors and depositors (*Grindley v. First Nat. Bank-Detroit* (6 Cir. 1936) 87 F.2d 110, 112).

In *Scott v. Armstrong* (1892) 146 U.S. 499, the Supreme Court, replying to an argument that an equitable setoff violated the "ratable dividend" provisions of the National Bank Act, pointed out:

> "The equity of equality among creditors is either found inapplicable to such set-offs or yields to their superior equity" (146 U.S. 511).

The Supreme Court has recognized the inequity of permitting a creditor to profit from his own wrongdoing. In *Taylor v. Standard Gas Co.* (1939) 306 U.S. 307, in a bankruptcy reorganization of a subsidiary corporation, the Supreme Court subordinated the parent company's claim as a creditor to the claims of other creditors and preferred shareholders of the subsidiary because of improper management of the subsidiary for the benefit of the parent. Although national bank liquidations are not governed by the Bankruptcy Act, the equitable principle that the claims of those whose acts caused or contributed to the failure of an enterprise should be subordinated to the claims of the innocent (*Taylor v. Standard Gas Co.* (1939) 306 U.S. 307, 322) is, we respectfully submit, particularly applicable to the case at bar.

CONCLUSION

For the foregoing reasons, we respectfully submit that the orders dismissing the defendant depositors and dismissing the action should be reversed.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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